Due service of the within Suggestion of a Diminution of Record and Motion for Certiorari, Notice, Affidavit and Points and Authorities is hereby acknowledged this.....day of ....., 1938.

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Counsel for Petitioners.

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 19[illegible]

No. [illegible] 21

WM. H. NORBERT, VERNON BETTIS, WILLIAM GROVER DICKINSON and ALDEN F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Brief of Respondent Insurance Commissioner in Opposition to Granting of Certiorari.

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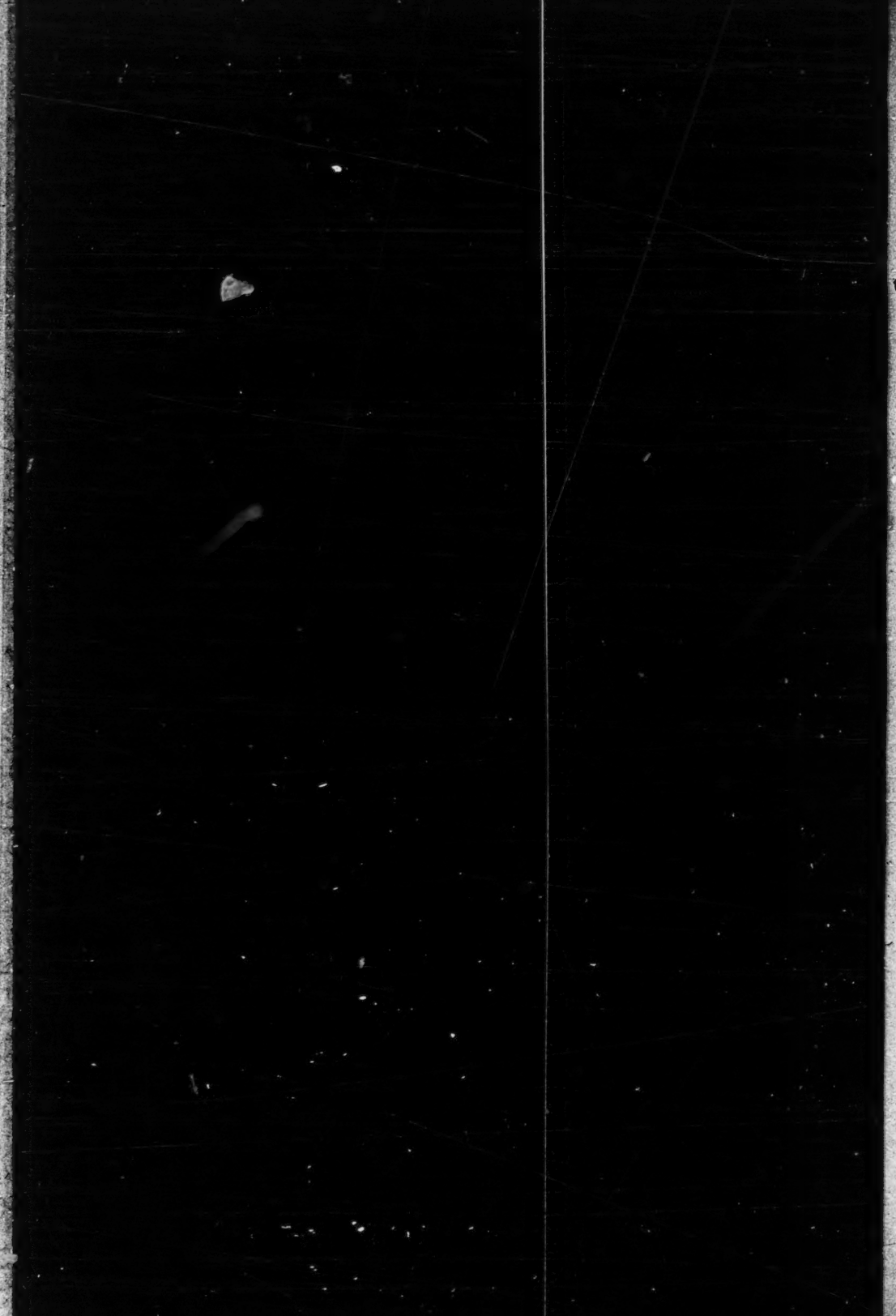

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No. 921.

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Brief of Respondent Insurance Commissioner in Opposition to Granting of Certiorari.

I.

Opinions Below.

The opinion of the Supreme Court of California is not yet officially reported. It appears in the advance opinions of that court, *"California Decisions,"* vol. 94, page 681; and in 74 Pac. (2d) 761. It is printed in the record.[1]

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[1]R. pp. 1509-1544.

An oral opinion of the trial court is also printed in the record,[2] but under the California Practice is no proper part thereof.[3]

II.

Jurisdiction.

Jurisdiction of this court is sought to be invoked under section 237(b) of the Judicial Code (U. S. C. Tit. 28, sec. 344(b)). It is conceded that some of the points urged by petitioners involve rights asserted under the Constitution of the United States, and are thus within the jurisdiction of this court.

Petitioners seek review on the ground that the state court has decided Federal questions of substance not heretofore determined in this court; and that it has decided other Federal questions of substance in a way probably not in accord with applicable decisions of this court.[4]

This respondent contends that no Federal questions of substance have been raised. We conceive that only two Federal questions are raised in the Petition at all; that both are insubstantial; and that the decision of the state

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[2]R. pp. 1469-1506.

[3]R. p. 1530. See also *Estate of Finkler* (1936) 7 Cal. (2d) 97, 59 Pac. (2d) 801, 803; *DeCou v. Howell* (1923), 190 Cal. 741, 751, 214 Pac. 444.

[4]See Supreme Court Rule 38(5)(a).

courts thereon was in accord, and not in conflict, with applicable decisions of this court. All other questions attempted to be raised are in our opinion purely questions of state law.

Petitioners have stated their points three times[5] in somewhat different order and in somewhat different language. We conceive it to be most convenient to this court to furnish a brief statement of facts before analyzing the petitioners' contentions.

A full and accurate statement of facts is furnished in the opinion of the State Supreme Court.[6] For the convenience of this court, we append a brief statement of facts, eliminating matters which do not appear to be material on this petition.

In making our statements of facts, we have been unable to follow that of petitioners, which contains many statements of what we believe to be immaterial matters, and many statements which we believe to be in conflict with, or not supported by, the record. We have, however, attempted to point out in footnotes most of the matters on which we take issue with their statement.

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[5]Petn. pp. 12-22, 28, 29-32.

[6]R. pp. 1518-1526, 1528-1529.

III.

Statement of Case.

The order of the trial court approved the execution of a certain Rehabilitation and Reinsurance Agreement. It was from that order, and that order alone, that the appeal to the State Supreme Court was prosecuted.

The State Supreme Court affirmed the order appealed from.[7]

The Insurance Code of the State of California provides a comprehensive statutory scheme for the handling by the Insurance Commissioner of insolvent insurance companies.[8]

On July 22, 1936, The Pacific Mutual Life Insurance Company of California (usually for convenience referred to in the proceedings below and herein as "Old Company") was insolvent, and in such condition that its fur-

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[7]In affirming that order the State Supreme Court was under the necessity of determining whether a valid order appointing the Insurance Commissioner as Conservator of The Pacific Mutual Life Insurance Company of California had been made. It held that one order to that effect was void; but further held that a subsequent order to the same effect was valid, and constitutes a sufficient basis on which to predicate the proceedings. We take issue with petitioners' statement that the State Supreme Court affirmed "a series of void orders." (Petn. p. 4.) The error in that statement will be later developed in this brief.

[8]Important provisions are set out in Petition, App. pp. 59-64. A brief summary appears at R. pp. 1533-1534.

ther transaction of business would be hazardous to its policy holders, its creditors, and the public.[9] On that date the Insurance Commissioner, acting under section 1011 of that Code,[10] filed his application[11] in the appropriate court[12] praying that he be appointed Conservator of the Old Company.

Promptly after the filing of that application, Judge Douglas L. Edmonds, then a judge of the Superior Court, made his order in terms appointing the Commissioner as Conservator, and vesting in him title to the assets of the Old Company.[13]

Judge Edmonds thereafter made further orders, directing the liquidation of the Old Company [R. pp. 49-52] and approving a "Rehabilitation, Sale and Transfer of Assets, and Reinsurance Plan and Agreement."[14] Both of said orders were void[15] and were apparently so treated by the Superior Court in its later proceedings,[16] although

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[9]R. p. 1386.

[10]Petition App. pp. 59-60.

[11]R. pp. 1-32.

[12]Superior Court, being the lower court of general jurisdiction in California.

[13]R. pp. 34-38.

[14]R. pp. 103-107. This is the so-called "reorganization" referred to at the top of Petition, p. 5. It was abandoned, never reached the State Supreme Court, and is not in issue here.

[15]R. pp. 1526-1527.

[16]See R. pp. 1378-1395; esp. 1389.

the record does not show their vacation.[17] They were not relied upon below, are not relied upon here, and may be entirely disregarded.

Twenty days after the original order appointing Conservator, Judge Edmonds pointed out that he was the holder of a $5000 life policy in the Old Company.[18] Under the California law, as declared by the Supreme Court of that state in this proceeding, that fact made his orders in the premises void.[19] Immediately upon that disclosure being made, on August 11, 1936, the original application for appointment as Conservator was presented to Judge Henry M. Willis, another Judge of said court; who heard it and considered it[20] and thereupon made his

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[17]Because of the nature of the record we are unable to demonstrate the vacation of these orders. Such vacation would be by minute order, which would be no part of a "Judgment Roll." *Pedrorena v. Hotchkiss* (1892), 95 Cal. 636, 638, 30 Pac. 787, 788. But clearly the State Supreme Court does not, as petitioners assert (Petition, p. 10), affirm these void orders. It expressly says they are void. [R. p. 1526.]

[18]R. p. 323.

[19]R. pp. 1526-1527.

[20]R. p. 323. Petitioners say that the application was the only evidence before the trial court (Petition, pp. 13, 35). The record does not show what evidence was taken at that time. The order does recite that the court "reheard" the matter, and was fully advised [R. p. 323]. Since petitioners elected to appeal on a judgment roll, we are unable to show by reference to the record the character and amount of evidence taken.

own order appointing the Commissioner as Conservator and vesting title to the assets of the Old Company in him as such.[21] This order also contained language of ratification of the original order appointing Conservator; but the effect of that language need not be decided. *The independent order of appointment made by Judge Willis stands by itself, and is alone a sufficient foundation upon which to predicate the order appealed from.*

In order to carry on the business of the Old Company, and to preserve its good will, going concern value, and agency organization, the Commissioner had caused to be organized a corporation, Pacific Mutual Life Insurance Company (throughout the proceedings and herein usually referred to as "New Company"), through the agency and instrumentality of which he continued to conduct the

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[21]R. pp. 322-328, esp. 325; pp. 1521-1522; 1527. Petitioners persist, in this court as in the state courts, in failing to make candid disclosure of the terms of the order made by Judge Willis. (Petition, pp. 10, 39, 43) (But see Petition, pp. 13, 43.) Its nature is clearly disclosed in the record, and in the opinion of the State Supreme Court, at the points above cited.

business.[22] His action in this respect was approved by the trial court,[23] and by the Supreme Court of the state.[24]

Section 1043 of the California Insurance Code provides that the Commissioner, either as conservator or liquidator, may, subject to the approval of the court, reinsure the business of the insolvent or enter into rehabilitation agreements.[25] Acting under that section, the Commissioner proposed a Rehabilitation and Reinsurance

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[22]R. pp. 850-851; pp. 1528-1529; p. 1535. It is not true that the New Company, during any period covered by the record, functioned as an entity "discharged from all supervision of the Commissioner except the general supervision which he exercises over all insurance companies in this state." (Petition, p. 10.) Petitioners have not brought up the evidence in that regard; but the record does show [R. pp. 850, 1387, 1388] that the Commissioner held all of its stock; and the record shows that *he* conducted the business through the agency and instrumentality of the Company. [R. p. 851.] The precise extent of the control he exercised does not, however, appear in the record, which omits all of the evidence.

[23]R. pp. 1378-1395, esp. 1387-1388, 1395.

[24]R. pp. 1528-1529.

[25]Petition App. p. 64. Petitioners persist (Petition, pp. 5, 49 *et passim*) in distinguishing between "reorganization" and "rehabilitation." The nature of that distinction is not explained. In any event, the State Supreme Court has held that what was done in this case was "Rehabilitation" within the meaning of the statute.

Agreement on September 25, 1936.[26] An order to show cause was issued by Judge Willis, returnable October 19, 1936;[27] and notice of the hearing was given by publication, posting, and service upon numerous counsel appearing, as well as by mailing to all policy holders and stockholders.[28]

The proposed Rehabilitation and Reinsurance Agreement provided for the transfer to the New Company of all of the assets then held by the Conservator, except stock of the New Company and certain asserted claims.[29] The New Company agreed to reinsure and assume all policy claims and liabilities other than liabilities under the so-called "Non-Can Policies."[30] The New Company also agreed to reinsure and assume a specified percentage

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[26]R. pp. 846-904. The "Rehabilitation, Sale and Transfer of Assets, and Reinsurance Agreement", approved by the void order of Judge Edmonds and subsequently abandoned, is not "the whole plan of reorganization" (Petition, pp. 8, 9). On the contrary, it is no part of the plan approved by the Superior Court in the order appealed from, and passed upon by the State Supreme Court.

[27]R. pp. 909-913. The order to show cause did not refer to any ratification of prior orders, nor to making any order *nunc pro tunc*. (See Petition, pp. 10, 44.) It did have to do with the ratification of certain *acts* of the Commissioner. This point will be later developed.

[28]R. pp. 909-913; 1383-1384; 1524.

[29]R. pp. 859-860.

[30]R. pp. 862-865.

of the obligations under the Non-Can Policies;[31] and to restore further benefits and possibly full benefits from certain designated sources of income of the New Company.[32] Proceeds of the assets retained by the Commissioner (*i. e.*, stock of the New Company and asserted claims against officers of the Old Company) were also made available in part for such restoration.[33] The agreement contemplated the appointment of a liquidator, and the payment of claims filed with him from the remaining proceeds of the retained assets[34] and, if any further moneys prove necessary, from certain moneys payable to him by the New Company.[35] Policy holders were not required to accept the proffered reinsurance; but could if they preferred reject the benefit of the agreement and proceed against the estate of the insolvent in accordance with ordinary forms of law.[36] It is to be noted that the

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[31]R. pp. 873-876.

[32]R. pp. 877-879.

[33]R. pp. 885-888.

[34]R. pp. 885-888.

[35]R. pp. 882-885.

[36]R. pp. 900-902; 1525-1526. It is therefore not correct to state (as the petition expressly does at page 56, and impliedly does at page 15) that a new obligor is substituted without the consent of the policy holder. Nor is the contract of the holder of a "non-can" policy altered or attempted to be altered except in so far as he may consent thereto, although the petition here is largely founded upon such a supposed alteration. (See Petition, pp. 15, 28(5); 32; 54; 55-56.)

interests of stockholders of the Old Company are completely subordinated to those of its creditors and policy holders. They are entitled to no participation until full restoration of the benefits provided by the policies of consenting non-can policy holders in amounts as originally written by the Old Company; and all claims and expenses of the Conservator and Liquidator (including, of course, claims of non-consenting policy holders) have been fully paid.[37]

The foregoing outline presents the most important features of the agreement, so far as it seems material here.[38]

Petitioners, in their objections to the approval of the proposed agreement, asserted in general language, (a) that the proposed agreement was an unconstitutional exercise of the power of the Insurance Commissioner; and (b) that all of the laws under which he was acting were unconstitutional.[39] Other points raised by them in their objections relate to questions of fact and questions of state law.

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[37]R. pp. 1396-1444, *passim;* esp. p. 1435.

[38]The complete agreement is attached to the order of the Superior Court, R. pp. 1396-1444. A summary is in the opinion of the State Supreme Court, R. pp. 1525-1526.

[39]R. pp. 993-994; 1235-1236; 1275; See also R. pp. 250-251; 628-629; 684-685.

The trial court approved the agreement and authorized its execution.[40] In detailed recitals the trial court found that the Old Company had been insolvent and in a hazardous condition;[41] that the properties were more valuable in a going concern than in separate parcels, and that the intangibles were worth several million dollars which would be preserved by the agreement;[42] that the plan embodied in the agreement was feasible, fair, just, and equitable, and afforded a feasible method of providing full restoration in a reasonable time;[43] and that all persons interested were afforded reasonable opportunity to participate in the plan.[44] The Commissioner was authorized to execute the agreement, and to convey the properties to the New Company.[45] The record presented does not include the evidence, and in any event stops with the entry of the order (which is the order under review); and obviously

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[40]R. pp. 1383-1395. The order did not ratify or confirm any of the earlier orders. Petitioners' statement that it did (Petition, p. 11) refers to a portion of the order ratifying *acts of the Commissioner*. This new order, and not any of the earlier orders (as petitioners indicate at pp. 11 and 40 of their petition) is the basis of the rehabilitation.

[41]R. p. 1386.

[42]R. p. 1386.

[43]R. pp. 1386-1387.

[44]R. p. 1387.

[45]R. p. 1388.

no conveyance made pursuant to that order would appear in the record.[46]

Petitioners assert that the trial court held that it was powerless to control or guide the action of the Commissioner. This is not a correct statement of the holding of the trial court, and is not supported by petitioners' reference to the record.[47] The trial court asserted the right to pass upon, and did pass upon, the question of whether the plan was unfair, unreasonable, or arbitrary.[48]

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[46]Petitioners repeatedly assert (Petition, pp. 9, 13, 37, 52-53) that no conveyance was ever made except that of July 22, 1936. They fail to show how that fact, if true, has injured them. The appeal is from an order authorizing a conveyance to be made. In the nature of things, the record does not show what has happened since the making of the order; and therefore does not show whether it has been complied with. If any presumption is to be indulged, however, it is that the order has been complied with and the new conveyance made. Petitioners assert (Petition, p. 12) that the State Court held that title vested in the New Company on July 22d. As we read the opinion, the court holds that the ratification of that conveyance was valid; but does not indicate whether the ratification relates back to July 22d, or to August 11th (by which date, as we will show, the Commissioner certainly had title); or whether it relates back at all. The point is immaterial on this appeal, as we will show hereafter.

[47]R. p. 1501. We have already (note 2 and text) observed that the opinion is not properly a part of the record.

[48]R. pp. 1501, 1544.

The order of approval was filed December 4, 1936, and entered December 7, 1936.[49] It does not, however, purport to be entered *nunc pro tunc*, as petitioners suggest.[50] The agreement, by its terms, became effective as of July 22, 1936; that is to say, liabilities were assumed as they had existed on that day. It is, of course, common business practice, in transferring a going business, to make the contracts with relation thereto effective on a day certain, and usually on a past day.

Appeals to the State Supreme Court by these petitioners resulted in the affirmance of the order;[51] and this petition follows.

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[49]R. p. 1444.

[50]Petition, p. 11.

[51]R. pp. 1509-1545. The Supreme Court affirmed the order appealed from and necessarily thereby held the order of August 11, 1936, appointing conservator to be valid. It held the orders of Judge Edmonds to be void. It did not (as petitioners say in their petition, page 15) hold that all of the orders made in consummation of the reorganization were absolutely void.

IV.

ARGUMENT.

Preliminary Statement.

Petitioners specify five errors.[52] All are worded as Federal questions; but it is a short and sufficient answer to the first four specifications, so far as this petition is concerned, that no Federal questions appear to have been raised in or decided by either of the courts below. It is a further answer to specifications 1, 2, and 4 that

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[52]Petition, p. 28. We deem it unnecessary to answer mere generalities, not specified as errors, of the nature appearing on pages 19 and 20 of the petition. It seems obvious from the record, for example, that both Commissioner [R. pp. 851, 852] and court [R. pp. 1378-1395] felt that the proposed plan was the best possible plan for the policyholders. Certainly petitioner Neblett's proposal for immediate liquidation [R. pp. 1347-1349] would destroy the very insurance which he concedes on those pages it is important to preserve. The implicit charges of misconduct and bad faith are fully answered by the opinion of the State Supreme Court [R. p. 1517]. Whether use of the word "mutual" in the names of the companies is proper is also a question of evidence and of state policy, decided by the state courts [R. p. 1544]. Nor is the suggestion that the Insurance Commissioner becomes an unrestrained dictator (Petition, pp. 20, 45) borne out by the record, which shows a court approval after many weeks of hearing; followed by a full review in the State Supreme Court.

the questions involved are fundamentally questions of state law; and the claim that they involve any constitutional rights is so entirely nebulous as to raise no shadow of a Federal question. The attempt to bring the alleged error complained of in specification 3 within the meaning of the 14th Amendment is also rather fanciful, and would involve an extension of that Amendment far beyond any limits this court has heretofore suggested.

Specification 5 does involve a Federal question which was raised in and decided by the state courts; but the point therein involved has been so completely established in accordance with that decision by decisions of this court, that the Federal question no longer remains substantial.

Respondent Insurance Commissioner, however, deems it his duty to point out, although briefly, that the questions of state law involved in the first four specifications were correctly decided; and that the constitutional questions attempted to be asserted therein would have been wholly without substance, even if they had been properly raised.

SUMMARY OF ARGUMENT.

Respondent Insurance Commissioner contends:

With respect to Petitioners' First Specification of Error:

The state court obtained jurisdiction upon the filing of the Commissioner's application.

1. Even if it did not, the point was not raised below.

2. And the implied decision of the state courts that they had jurisdiction involves only a question of state law, not reviewable here.

3. The application in any event sufficiently complied with the statute.

With respect to Petitioners' Second Specification of Error:

Title was vested in the Commissioner by valid order, and passed to the New Company by valid authorization.

1. Whether the attempted ratification of the first (void) order was effective is not involved on this appeal, and was not decided below.

2. The order of Judge Willis contains an express appointment, sufficient to vest title in the Commissioner.

3. The effect of the order of Judge Willis is a question of state law.

4. The order appealed from authorizes a conveyance. Whether the New Company received title before that order is immaterial.

5. Whether an unauthorized conveyance can be ratified; and, if so, whether title relates back, are both questions of state law.

With respect to Petitioners' Third Specification of Error:

The statute is sufficiently definite to afford due process.

1. The question was not raised below.

2. The statute did not forbid or require action by petitioners; and they are not compelled to construe it, or to act under it before it is construed.

With respect to Petitioners' Fourth Specification of Error:

No question of due process is raised by the Commissioner's use of the New Company.

1. The right of the Commissioner to delegate his powers is a question of state law.

With respect to Petitioners' Fifth Specification of Error:

A. The order approving the agreement was a valid order.

B. The obligations of petitioners' contracts were not improperly impaired.

1. The case is controlled by *Doty v. Love*, 295 U. S. 64.

2. The state police power permits the regulation of financial institutions, including insurance companies; and contractual rights must yield to that power. That the state action here taken was reasonable and fair has been found by the state courts, and petitioners do not challenge that finding, or point to any instance of unreasonableness. *This proposition is so well established that the Federal question it raises is no longer substantial.*

C. There was no substantial impairment in fact.

1. Petitioners were not required to accept reinsurance; they could, at their option, retain all of their rights against the Old Company. Therefore the contracts were not impaired at all.

2. That they might not be paid in full (if true) would be a consequence of insolvency, and not of any action of the state.

3. The point that a liquidator had not been appointed was not raised below; but in any event an order of liquidation is not necessary, and if it were, it must be presumed that such an order has been made.

REPLY TO SPECIFICATION No. 1.

(Petitioners' Brief, Point A.)

The State Court Obtained Jurisdiction Upon the Filing of the Commissioner's Application.

Petitioners assert that the original application did not show that the company, having been insolvent by $17,500,000 on December 31, 1935,[53] was still insolvent or in a hazardous condition seven months later on July 22, 1936. They then assert that this alleged defect prevented jurisdiction from attaching in the trial court. They then con-

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[53]R. pp. 26, 31; Petition, p. 7.

clude that it is a denial of due process of law to permit titles to be affected by order of a court which has not obtained jurisdiction.

The constitutional question was not raised in or passed upon by either of the courts below. The state courts held that they did not obtain jurisdiction. That holding is implicit in the very fact that they took and exercised jurisdiction throughout the proceeding.[54] Moreover, the opinion of the Supreme Court expressly states that the application was sufficient.[55]

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[54]*Standard Oil Co. v. Missouri ex inf. Hadley* (1912), 224 U. S. 270, 280-281, 56 L. ed. 760, 767, 32 Sup. Ct. 406, 408, 409.

This has been the settled rule and practice in California throughout its history: "The first point decided by any court, although it may not be in terms, is, that the court has jurisdiction, otherwise it would not proceed to determine of the rights of the parties. For the purposes of the first trial in this court, the jurisdiction was as much determined as though the point had been made and passed upon." *Clary v. Hoagland* (1856), 6 Cal. 685, 688. Accord: *Scrimsher v. Reliance Rock Co.* (1934) 1 Cal. App. (2d) 382, 393, 36 Pac. (2d) 688, 692; *Harris v. Seidell* (1934), 1 Cal. App. (2d) 410, 417, 36 Pac. (2d) 1104, 1107.

[55]R. p. 1528: "The petition for appointment as conservator, containing proper allegations, was filed July 22nd."

The sufficiency of the petition to invoke the jurisdiction of the court is obviously a question of state law.[56] This court has repeatedly held that the jurisdiction of the state courts is a question for the state courts to decide.[57]

Moreover, the State Supreme Court was obviously right in its decision. The statute permits the order upon the filing of an application showing that the insurance

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[56]"It is of course essential to the validity of any judgment that the court rendering it should have jurisdiction not only of the parties but of the subject matter . . . . But it is equally well settled that it is for the Supreme Court of the state finally to determine its own jurisdiction and that of other local tribunals, since the decision involves a construction of the laws of the state by which the court was organized . . . . Its decision and judgment necessarily imply that under that clause of the Constitution it had jurisdiction of the subject-matter and authority to enter judgment of ouster and fine in civil *quo warranto* proceedings. That ruling is conclusive upon us, whether the judgment is civil or criminal or both combined." *Standard Oil Co. v. Missouri ex rel. Hadley* (1912), 224 U. S. 270, 280-281; 56 L. ed. 760, 767; 32 S. Ct. 406, 409.

[57]*McDonald v. Oregon Navigation Co.* (1914), 233 U. S. 665, 669-670; 58 L. ed. 1145, 1148-1149; 34 S. Ct. 772, 773. *Gasquet v. Lapeyre* (1916), 242 U. S. 367, 369; 61 L. ed. 367, 370; 37 S. Ct. 165, 166. *Standard Oil Co. v. Missouri ex rel. Hadley* (1912), 224 U. S. 270, 280-281; 56 L. ed. 760, 767; 32 S. Ct. 406, 409. *De Bearn v Safe Deposit & T. Co.* (1914), 233 U. S. 24, 33-34; 58 L. ed. 833, 836-837; 34 S. Ct. 584, 587.

company "is found, after an examination, to be in such condition that its further transaction of business will be hazardous . . ."[58] The application alleges that the Commissioner (with others) made an examination; and that "said examination . . . shows that respondent corporation *is* in such condition that its further transaction of business will be hazardous . . ."[59] (Italics ours.) The allegation is obviously sufficient.

A second justification for the assumption of jurisdiction appears later in the same statute. If the application is "accompanied by a certified copy of the Commissioner's last report of examination . . . showing such (insurance company) to be insolvent . . .", the order is likewise directed to issue. The application here was accompanied by a certified copy of a report of examination dated the day before the filing of the application.[60] It is to be noted that this portion of the statute does not use the words "to exist" (upon which pages 35 and 36 of the petition so insist).

The application affirmatively states that the examination shows that the company "is" (*i.e.*, at the date of the application) insolvent.[61] Again, the allegation is obviously sufficient.

Specification No. 1 affords no reason for the issuance of a writ of certiorari.

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[58]Cal. Insurance Code, §1011 (d); Petn. p. 60.

[59]R. p. 3.

[60]R. pp. 11-32, esp. p. 12.

[61]R. p. 3.

REPLY TO SPECIFICATION No. 2.

(Petitioners' Brief, Points B, C, D, and E.)

Title Was Vested in the Commissioner as Conservator By Valid Order, and Passed to the New Company by Valid Authorization.

Petitioners claim that they were denied due process by a holding that the title was vested in the Commissioner by a void order.[62]

But no such decision appears to have been made below.

In fact, no question of title was involved in the lower courts. It was necessary to decide whether the Commissioner had been validly appointed as Conservator prior to the submission of the Rehabilitation and Reinsurance Agreement, since under state law it is only after a conservatorship has been appointed that such an agreement can be approved. But as we have already shown, the order made by Judge Willis on August 11th constitutes an

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[62]We note petitioners' claim that Commissioner and the Old and New Companies asserted that the disqualification of Judge Edmonds was waived, and that the Supreme Court of the State tacitly so held. (Petn. p. 38.) If it had, it might well have been a mere matter of state law. But the fact is that no such claim appears upon the record or has been or is made. The State Supreme Court clearly did not so hold, but on the contrary held Judge Edmonds' orders to be void. [R. p. 1526.]

independent appointment, and hence a sufficient basis for the subsequent proceedings.[63]

The contention of petitioners that Judge Willis' order had nothing to operate upon, since all of the assets of the Old Company had been theretofore conveyed away,[64] is predicated upon a verbal quibble as to the "assets" referred to. The Old Company had its original assets if the conveyance was void; it had a right to set aside the

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[63]The State Supreme Court points out that the order of August 11th contained both an independent order and a ratification of the earlier order of Judge Edmonds. It has been held that even a void order can be ratified, and that the ratification may relate back to the date of the original order. (*Younger v. McCoy* (Tex. Civ. App. 1932), 53 S. W. (2d) 165, 166. See also: *Comstock v. Lomex* (Tex. Civ. App. 1911), 135 S. W. 185, 186. *Walker v. Wilkinson* (C. C. A. 5th (1925)), 3 Fed. (2d) 867, 869.) Due process requires only one hearing and even a hearing after judgment would suffice. (*Moore Ice Cream Co. v. Rose* (1933), 289 U. S. 373, 384; 77 L. ed. 1265, 1273; 53 S. Ct. 620, 624. *American Surety Co. v. Baldwin* (1932), 287 U. S. 156, 168; 77 L. ed. 231, 239; 53 S. Ct. 98, 102. *Bourjois, Inc., v. Chapman* (1937), 301 U. S. 183, 188-189; 81 L. ed. 1027, 1032; 57 S. Ct. 691, 695.) It therefore seems obvious that no substantial question of due process arose, even if, as Petitioners assert, the State Court held that the original order was ratified. But the date upon which the Commissioner received technical legal title is not involved in this appeal; and, as we read the opinion of the State Supreme Court, was therefore not decided below.

[64]Petn. pp. 43-44.

conveyance if the conveyance was voidable; and it had the proceeds of the conveyance if the conveyance was valid. Whatever it had was an asset of the Old Company to which the Commissioner succeeded by virtue of the order of August 11th.

It is equally obvious that the original assets of the Old Company[65] have reached or will reach the New Company. The order appealed from authorizes a new conveyance to that company.[66] Presumptively it was made or will be made after the entry of the order (and hence beyond the scope of the record on this proceeding.)[67]

If the conveyance of July 22 was void, the assets have passed or will pass to the New Company by the conveyance authorized by the order appealed from; if the original conveyance was voidable, the right to set it aside is surrendered by the new conveyance; and if the original conveyance was valid, the New Company merely retains its title, confirmed by a new deed.

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[65]Disregarding, of course, such changes in assets as were incident to the operation of the business by the Commissioner through the instrumentality of the New Company.

[66]R. pp. 1388-1389.

[67]Petitioners repeatedly assert that the conveyance of July 22 was the only conveyance. (Petn. pp. 9, 13, 37, 52-53.) But it is surely a novel doctrine that an order authorizing a conveyance should be reversed because the record does not show that it has yet been made. If it had not, it could yet be made when all means of reviewing the order were exhausted.

It follows that even if the original conveyance was improperly made, the same property must pass to the New Company pursuant to the order of December 4th. Petitioners do not suggest that the administration during the period from July 22 to December 4 was inefficiently conducted. A setting aside of the conveyance of July 22 would result in nothing other than an immediate reconveyance pursuant to the order of December 4. It seems obvious that the manner in which the business was operated while the litigation was pending, and the technical state of the title during that period, are wholly immaterial on this appeal; and that petitioners are not injured by the conveyance of July 22nd.

But any confusion petitioners may assert with respect to the title to the properties is not born of the opinion of the state court. That court held that the state statute authorizes summary seizure of the properties of an insolvent insurance company by the Insurance Commissioner.[88] Such a statute, it is thoroughly established, is not a violation of constitutional guaranties.[89] The court then held that after such seizure the Commissioner had the power for the preservation of the business to transfer assets to the New Company in order to preserve going concern

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[88]R. pp. 1527-1528.

[89]*State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437; 132 Pac. 755; L. R. A. 1915E 675; affirmed (1915), 238 U. S. 611; 59 L. ed. 1488; 35 S. Ct. 792.

values.[70] It held that ratification of such acts (as distinguished from ratification of the void orders pursuant to which they were done[71]) was sufficient under state law.[72]

Surely, these are all questions of state law. And as surely, there is nothing surprising in a holding that ratification is the equivalent of a prior authorization. Certainly it is not a violation of due process for the state to adopt so elementary a principle of law.

No Federal question is raised by Specification No. 2.

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[70]R. pp. 1528-1529. Petitioners say (Petn. p. 51) that the Supreme Court of the State held that this power flowed from section 1037 (d) of the Insurance Code. But no record reference supports their assertion. Perhaps that section was in the mind of the court, but we fail to find that it so stated in its opinion.

[71]Petitioners assert that the void orders were ratified. (Petn. p. 39; see also pp. 10, 11, 15, 43, 44.) The record shows only one attempt to ratify any of Judge Edmonds' orders—and that is the order appointing Conservator. [R. p. 325.] All of his other orders were completely abandoned. There was, however, ratification of certain *acts* which had been done by the Commissioner. [R. pp. 1387, 1388.] It is quite common to ratify acts of officers, receivers, or agents, whether or not they have been done pursuant to a prior void authorization. If one acting under a forged power of attorney attempts to convey X's property, surely X can ratify the transaction; even though the forgery of the power of attorney was a criminal act.

[72]R. p. 1529: "We find no irregularity or illegality in this phase of the transaction."

REPLY TO SPECIFICATION No. 3.
(Petitioner's Brief, Points G and H.)

The Statute is Sufficiently Definite to Afford Due Process.

Petitioners assert that the statute is so uncertain in its meaning that its enforcement denies them due process of law. Petitioners argued below that the agreement approved was not a "Rehabilitation" or a "Reinsurance" agreement. The trial court and the Supreme Court of the state held that it was both. But it does not appear that prior to this petition it has been suggested that such a holding involved any constitutional question. Indeed, it appears that Petitioner Neblett has conceded in the state court the constitutionality of the statute, at least for himself.[73]

Nor is any substantial constitutional question involved. Petitioners refer to the well established rule that a statute which forbids or requires the doing of an action in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[74] But

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[73]R. p. 1532, 20 lines from end of page.

[74]*Connally v. General Const. Co.* (1926), 269 U. S. 385, 391; 70 L. Ed. 322, 328; 46 S. Ct. 126, 127. Petnrs. Brief, pp. 49-50.

the statute here involved neither *forbids* nor *requires* petitioners to act. The cases cited by petitioners are all cases in which the person complaining has been required, at his peril, to interpret a vague statute; and to interpret it correctly at the risk of losing his liberty or property.[75] But here petitioners were not required to interpret the statute at all. The statute was a mere grant of power to state officers and courts. Such grants are habitually made in general terms. Interpretation of the statute is a problem for the state court. Until it has made its determination that the particular agreement is within the grant of power, petitioners are not called upon to make any election. After it has done so, the uncertainty no longer exists. In this situation there is no denial of due

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[75] *Connally v. General Const. Co.* (1926), 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127; *Cline v. Frink Dairy Co.* (1927), 274 U. S. 445, 457-464, 71 L. Ed. 1146, 1152-1155, 47 S. Ct. 681, 685-687; *Small Co. v. American Sugar Refining Co.* (1925), 267 U. S. 233, 238-239, 69 L. Ed. 589, 593, 45 S. Ct. 295, 297; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.* (1921), 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054, 1056.

process.[76] Clearly it cannot be the law that every state statute which requires construction is by that very fact unconstitutional.

Petitioners' Point G,[77] apparently directed at the same specification of error, clearly raises no Federal question. It is merely an assertion that the California court improperly construed its statute, and that under California law no incidental powers can be implied thereunder. The short answer is that the California Supreme Court has

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[76]"These considerations also dispose of the contention that Sec. 902 'is so vague and uncertain that it is meaningless, and therefore affords no remedy.' It was not necessary for the Congress in insisting that a claimant should not recover where it appeared that he had not borne the burden of the tax, to attempt to formulate the conclusions which would be appropriate upon varying states of fact. Petitioner's argument, drawn from the writings of economists, is itself sufficient to show the futility of such an effort. The Congress could, and did, lay down a general principle and leave its application to the facts as they would appear in particular instances in a proceeding adapted to their full disclosure. The general principle thus laid down is no more vague and indefinite than the equitable doctrine which governs the right of recovery in actions for money had and received." *Anniston Mfg. Co. v. Davis* (1937), 301 U. S. 337, 353, 81 L. Ed. 1143, 1154, 57 S. Ct. 816; see also: *Puget Sound Power & Light Co. v. Seattle* (1934), 291 U. S. 619, 626-627, 78 L. Ed. 1025, 1031, 54 S. Ct. 542, 546; *United States v. Shreveport Grain & El. Co.* (1932), 287 U. S. 77, 82, 77 L. Ed. 175, 178, 53 S. Ct. 42, 44.

[77]Petnrs. Brief pp. 48-49.

held that the statute authorized this very agreement; and that holding is conclusive here.[78] It serves no useful purpose to analyze the distinction between implied power and incidental powers. Again the decision of the state courts that the powers here exercised were proper is conclusive of the issue.

Doty v. Love,[79] upon which this respondent will place reliance in discussing petitioners' fifth specification of

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[78]Petitioners further argue that the state court misconstrued the New York cases (Petn. pp. 48, 49), and therefore erroneously construed the California statute. If they did, it is still merely a question of state law. That the state court proceeded on an illogical or erroneous basis in interpreting its statute raises no federal question. But it should be observed that the New York cases cited by the state court obviously and definitely were *not* decided under section 52 of the New York act, as even a cursory examination of the statute and the cases will demonstrate. [See R. p. 1537.] It may also be noted that under the New York law the term "rehabilitator" is used where the California statute uses the term "conservator." The language of the New York cases referred to by petitioners (Petn. p. 48) as indicating that "rehabilitation" implies the continuance of the old company, are referring to what the California statute calls "conservation." New York cases of "rehabilitation" involving the formation of a new company and the abandonment of the old are referred to in the opinion of the State Supreme Court. [R. pp. 1535-1537.]

[79]*Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558.

error, is sought to be distinguished by pointing out that the Mississippi statute there involved is much more detailed than the California statute here applied.[80] This attempted distinction fails because it is based upon the misconception of the scope of the Fourteenth Amendment underlying all of petitioners' Point "G." The California statute has been construed by its state courts; and the only question here is whether the state could constitutionally authorize the course taken if the statute had been express and detailed.[81]

Specification No. 3 raises no substantial Federal question.

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[80]Petn. pp. 50-51.

[81]"At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the State Constitution and laws into the 14th Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the State Constitution and laws as construed by the state court are consistent with the 14th Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms." *Rawlins v. Georgia* (1905), 201 U. S. 638, 639-640, 50 L. Ed. 899, 900, 26 S. Ct. 560, 561.

REPLY TO SPECIFICATION No. 4.

(Petitioner's Brief, Point F.)

No Question of Due Process is Raised by the Commissioner's Use of the New Company.

Petitioners assert that the Commissioner delegated his powers to the New Company; and that such action is in violation of their constitutional rights. They challenged the use of the New Company in the state courts, as a matter of state law, and those courts held it proper.[82] But no constitutional question in this regard appears to have been asserted prior to this petition.

It is a short answer that the use of the New Company as a corporate agency for conducting the business prior to the approval of the Rehabilitation and Reinsurance Agreement did not affect any of petitioners' rights.

But in any event, the question is purely one of state law. A reading of petitioners' brief [83] discloses that the objection is based on two California statutes of 1915. Clearly their interpretation and reconciliation with the Insurance Code of 1935 is a question of state law.

The authorities cited are not at all in point. The *Schechter* case[84] relates to the delegation of legislative

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[82]R. pp. 1528-1529, 1535, 1537, 1387-1388.

[83]Petnrs. Brief pp. 46-47.

[84]*Schechter Corp. v. United States* (1935), 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837.

powers to the executive branch of the government; and is based on the doctrine of separation of powers of the Federal government. The *Hentschel* case[85] held that the judgment of the state court, acting with the consent of the Insurance Commissioner, appointing one other than the Commissioner as trustee of an insurance company in dissolution, was binding on other courts. The court is manifestly applying state law. The language quoted by petitioners[86] is not the holding of the Circuit Court of Appeals, but is that court's summary of a holding of the Missouri Supreme Court which had been cited to it. It is, again, a statement of state law. The *Levezey*[87] case is again a state court decision, establishing its own law. Although reported in Dallas, it is a decision of the High Court of Erorrs and Appeals of Pennsylvania. The holding is merely that under Pennsylvania law, a referee cannot delegate his authority.

We do not concede that there was any delegation of authority in the instant case. The Commissioner merely made use of a corporate agency through which he did business. But the propriety of his action, by whatever name it be called, was clearly a question of state law, and the State Supreme Court has conclusively held it proper.

No Federal question is raised by Specification No. 4.

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[85]*Hentschel v. Fidelity & Deposit Co. of Maryland* (1937) (C. C. A. 8th), 87 Fed. (2d) 833, 838-839.

[86]Petnrs. Brief p. 47.

[87]*Levezey v. Gorgas.* (Pa. 1799), 4 Dall. 71, 74-75, 1 L. Ed. 746, 748.

REPLY TO SPECIFICATION No. 5.
(Petitioner's Brief, Point J.)

A. The Order Approving the Agreement Was a Valid Order.

Petitioners' Specification of Error No. 5[88] includes the statement that the orders were void. That portion of the specification has been fully treated in the foregoing portion of this brief. It is necessary only to repeat that the only two orders necessary to sustain the agreement were those of August 11, 1936[89] appointing Conservator; and of December 4, 1936[90] approving the agreement. No reliance upon any orders of Judge Edmonds is required.

It should perhaps be pointed out that the order of December 4th does not refer to the earlier order of Judge Edmonds approving the earlier (and abandoned) plan; that order was conceded to be invalid. The agreement and the order approving it stand on their own feet. The agreement is not the same as that approved by Judge Edmonds; the two differ in various respects.[91]

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[88]Petnrs. Brief p. 28.

[89]R. pp. 322-328.

[90]R. pp. 1378-1444.

[91]Compare, for example, R. pp. 124-125, 131-132 with R. pp. 877-879.

B. The Obligations of Petitioner's Contracts Were Not Improperly Impaired.

Petitioners contend that the Rehabilitation and Reinsurance Agreement in its operation impairs the obligation of their contracts.

One of the petitioners complains that a new insurer has been substituted without his consent for the insolvent company with which he contracted[92] while the remaining petitioners object that the terms of their contracts have been changed in that they are required to take reduced protection.[93] The record shows that while benefits on certain policies are temporarily reduced provision is made for the ultimate restoration of benefits out of profits of the business of the New Company and other sources;[94] and that all of the assets are held for the benefit of the creditors.[95] Petitioners claim that no Liquidator has been

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[92]Petn. p. 15; Petnrs. Brief p. 56.

[93]Petn. p. 15; Petnrs. Brief p. 55.

[94]R. pp. 1416-1419; 1425-1427; 1525.

[95]R. pp. 1396-1444, passim; esp. 1425-1427, 1525-1526.

appointed, and hence that they are afforded no effective alternative to the acceptance of the agreement.[96]

Even if petitioners' contentions were correct no substantial Federal question would be raised.

The action of the Insurance Commissioner and the state court was clearly within the limits of the reserved power

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[96]Petn. pp. 16, 17; Petrs. Brief p. 56. It should be observed that petitioners, on this point, quote from the opinion of the California Supreme Court. (Petn. p. 16.) Their first quotation is from that court's summary of the abandoned plan, and not the plan approved. When discussing the approved plan, the court further points out that "The plan also provides that the Commissioner, either as conservator or liquidator, shall continue to hold all the stock of the new company as a protection to all old company policy holders." [R. p. 1526.] In the absence of the evidence, it must be presumed that the evidence introduced in the trial court demonstrated that such assets (together with other assets held by the Commissioner) would be sufficient protection to the policy holders. It must also be presumed that the court and Commissioner have performed their duty, and that a liquidation order has been made. Petitioners' second quotation (Petn. p. 16) is obviously a statement of a legal proposition, and not of a feature of the approved agreement. All a dissenter is entitled to receive as a matter of law, says the court, is what he would have received had there been a complete liquidation. The court then proceeds to point out [R. p. 1539] that the approved agreement presumptively gives him that much or more.

of the state. In *Doty v. Love*[97] this court upheld a plan for the rehabilitation of a bank against similar objections. In that case the rehabilitation was compulsory and it involved the substitution of a new party for the insolvent contracting party. Moreover, creditors were not assured of full payment but were compelled to rely upon the success of the future operations of a new company for the collection of the greater portion of their claims. Nothing further was done in the instant case so far as petitioners' contentions are concerned.

The power of the state to terminate contracts of banks and insurance companies through liquidation has never been seriously questioned. In *Doty v. Love* this court merely applied fundamental principles of constitutional law in reaching its conclusion that the state likewise had the power to modify such contracts through rehabilitation. And the case at bar is a mere application of the same principle.

The business of insurance is a business which is affected with a public interest.[98]

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[97]*Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558.

[98]*German Alliance Ins. Co. v. Kansas* (1913), 233 U. S. 389, 414, 58 L. Ed. 1011, 1023, 34 S. Ct. 612, 620; *O'Gorman & Young v. Hartford Fire Insurance Co.* (1930), 282 U. S. 251, 257-258, 75 L. Ed. 324, 327-328, 51 S. Ct. 130, 131-132.

The public interest extends to the preservation of an insurance company and the conservation of its assets when the safety of the institution is in jeopardy.[99] The extremity of windup and termination of the corporate business is to be avoided if possible.[100]

A creditor of an insolvent bank does not have a vested right to a liquidation at the hands of a state official and the rehabilitation of insolvent financial institutions may be proper.[101]

The Legislature of the State of California, through the enactment of sections 1011, 1016, and 1043 of the Insurance Code[102] impliedly demands that an effort be made to rehabilitate the business of an insolvent insurance company if rehabilitation can be accomplished. Only when it appears to him that it would be futile to continue to act

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[99]Compare: *Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558; *State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E 675 (affirmed (1915), 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792). See, also: *Pennsylvania v. Williams* (1935), 294 U. S. 176, 79 L. Ed. 841, 55 S. Ct. 380; *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader* (1935), 294 U. S. 189, 79 L. Ed. 850, 55 S. Ct. 386.

[100]*Palache v. Pacific Insurance Company* (1871), 42 Cal. 418, 432-434; *Re National Surety Co.* (1934), 239 App. Div. 473, 268 N. Y. S. 88 (affirmed (1934), 264 N. Y. 743, 191 N. E. 521); *National Surety Corp. v. Nantz* (1936), 262 Ky. 413, 90 S. W. (2d) 385.

[101]*Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558; *Gibbs v. Zimmerman* (1933), 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct. 140.

[102]Petn. Appendix pp. 59, 60, 62, 64.

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a Conservator may be apply for an order of liquidation under 1016. Furthermore, the California Supreme Court has held in this case that rehabilitation is to be preferred to liquidation.[103]

The exercise of the reserved power of the state to protect the comfort and general welfare of the people is paramount to the rights of individuals arising out of contracts and private rights are continually forced to yield to the demands of public necessity.[104]

The exercise of the state's power is qualified only by the requirement that the state action be reasonably related to the public interest and not arbitrary, unreasonable or oppressive.[105]

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[103]R. pp. 1534-1535.

[104]*Manigault v. Springs* (1905), 199 U. S. 473, 480-481, 50 L. Ed. 274, 278-279, 26 S. Ct. 127, 130-131; *Union Dry Goods Co. v. Georgia P. S. Corp.* (1919), 248 U. S. 372, 63 L. Ed. 309, 39 S. Ct. 117; *Stephenson v. Binford* (1932), 287 U. S. 251, 77 L. Ed. 288, 53 S. Ct. 181; *Producers' Transp. Co. v. Railroad* (1917), 176 Cal. 499, 169 Pac. 59 (affirmed (1920), 251 U. S. 228, 64 L. Ed. 239, 40 S. Ct. 131).

[105]*State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437, 446-447, 132 Pac. 755, 758-759 (affirmed (1915), 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792); *Lemieux v. Young* (1908), 211 U. S. 489, 495-496, 53 L. Ed. 295, 300, 29 S. Ct. 174, 176; *Hodgson v. Vermont* (1897), 168 U. S. 262, 272-273, 42 L. Ed. 461, 464, 18 S. Ct. 80, 83; *Mountain Timber Co. v. Washington* (1917), 243 U. S. 219, 237-238, 61 L. Ed. 685, 696, 37 S. Ct. 260, 264-265. See, also: *Farmers & Merchants Bank v. Federal Reserve Bank* (1923), 262 U. S. 643, 661, 67 L. Ed. 1157, 1164, 43 S. Ct. 651, 656.

The trial court has found (presumably on ample evidence) and the State Supreme Court has held that the action of the Insurance Commissioner was reasonable, and that the Rehabilitation Agreement itself was reasonabl.[106] In its order dated December 4, 1936 the trial court recites "that said rehabilitation and reinsurance agreement and the plan embodied therein, and each of them, is fair, just and equitable."[107]

The decision of the State Supreme Court is in full accord with the many decisions of this court holding that the state under its reserved powers may regulate insurance companies and their business; and that if private contracts hamper the exercise of that power they must yield to it as long as the exercise of the power is not arbitrary, unreasonable or oppressive.

The further constitutional point based upon the difference in the treatment accorded by the plan to the holders of life and non-can policies, is not raised by petitioners in either their petition or their brief. Had it been so raised, it would be thoroughly disposed of by the trial court's finding of a lack of unfair discrimination:[108] and by the reasoning of the State Supreme Court in completely demonstrating that adequate and sufficient reasons for the difference in treatment must be assumed, upon the record, to exist.[109]

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[106]R. pp. 1385 (par. 4), 1386 (pars. 6, 7), 1387 (pars. 8, 9). R. pp. 1538-1540.

[107]R. p. 1387.

[108]R. p. 1385.

[109]R. pp. 1538-1541; esp. 1540.

C. No Substantial Impairment Exists in Fact.

There is a further and complete answer to petitioners' contentions that the obligations of their contracts are improperly impaired. The preceding discussion has assumed that petitioners have, as they suggest, been compelled by state action to accept an alteration of their contracts. But this is not the fact. The policyholders of the insolvent company were not required to accept the New Company as a reinsurer or to suffer any change in the terms of their policies. They were entitled to reject the offer of reinsurance.[110]

It is obviously the law of California that liquidation may follow the approval of the Rehabilitation Agreement. That such procedure was contemplated is obvious throughout the proceedings.[111] Obviously, the appointment of a liquidator, which is intended to follow the approval of the agreement, would not appear in this record. When petitioners state[112] that no liquidator has been appointed they go beyond the record. We do not feel entitled to leave the record to assert the contrary; but we do not wish our silence to be taken as a concession of the truth of petitioners' statement. We do point out, moreover, that the point

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[110]R. pp. 1440-1441, 1538.

[111]R. pp. 1389, 1398, 1421-1424, 1425-1427, 1428, 1433-1437, 1440, 1441. Opinion of the State Supreme Court, R. p. 1525.

[112]Petn. p. 17; Petnrs. Brief p. 56.

was not raised in the State Supreme Court; and we are therefore unable to appeal to the facts that court judicially knew in this connection. In any event, it must be presumed that the court and the Commissioner performed their proper functions and that a Liquidator has been or will be appointed in due course.

A policy holder who has accepted the benefits of the Rehabilitation Agreement has thereby waived any right to object to the constitutionality of the agreement or the procedure through which it was authorized.[113]

On the other hand, a policy holder who dissents is given the right to file his claim for the full amount warranted by his policy as originally written and to have it allowed and paid in the contemplated liquidation proceeding. His contract is not altered. Nor is his right an empty right. The Rehabilitation Agreement provides for the payment of certain moneys to the Liquidator, who also holds the stock of the New Company and other assets for the protection of the policyholders.[114] If such claims are not paid in full that eventuality is not the result of action by the state, but is the result of the insolvency of the Old Company. In the absence of evidence, however, it can be presumed that the Liquidator will receive sufficient money to pay the claims of creditors in full; and it certainly

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[113]*Mulcahy v. Baldwin* (1932), 216 Cal. 517, 526, 15 Pac. (2d) 738, 741.

[114]R. pp. 1421-1424, 1425-1428.

cannot be presumed that the dissenter would have received a greater amount if the state, bound by tradition, had liquidated the entire business.[115]

The right of the state, through its officers, to take possession of the assets of an insolvent insurance company and regulate its liquidation is not challenged by peti-

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[115]R. pp. 1397, 1421-1424; R. p. 1539: "Appellant Bettin urges that his remedy against the old company is ineffective because that company has conveyed all its assets of value to the new company. The record shows the contrary. It discloses that as trustee for all creditors of the old company, including dissenters, the commissioner holds all of the stock of the new company, the agreement of the new company to pay him certain sums equivalent to the reserves established on policies whose owners dissent, and the agreement of the new company to pay over to him for the benefit of all creditors of the old company portions of its future earnings. There is nothing in the judgment roll to indicate the value of these assets. The record is also silent as to what the policyholders would have received in liquidation. All that the judgment roll discloses is that under the approved plan the assets are far in excess of what they would be on liquidation. On these appeals, without the evidence before us, in support of the judgment, we must assume that evidence was introduced on these vital points, and that such evidence demonstrated that dissenters under the plan will receive as much, or more, as they would have received on liquidation. The order appealed from contains a recital that adequate provision is made in the plan for each class of policyholder. We must assume that such recital was amply supported by evidence."

tioners. Indeed, it is too well established to be subject to question.[116] And unless petitioners voluntarily consent to the plan, the only impairment they suffer is that concededly lawful impairment of remedy incident to any state liquidation proceeding.

Conclusion.

Respondent Insurance Commissioner submits that no case for certiorari has been made out. All of petitioners' complaints, save two, are purely questions of state law. The two points which may involve Federal questions are susceptible of the following brief answers:

The point (not raised below) that the statute is so vague as to deprive them of their constitutional rights rests upon a misapplication of the principle that a statute forbidding or requiring an act must be sufficiently certain that those who must act under it may reasonably understand their duties. It is obvious that the mere fact

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[116]See: *Clark v. Williard* (1934), 292 U. S. 112, 123-124, 78 L. Ed. 1160, 1167, 54 S. Ct. 615, 620-621; *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader* (1935), 294 U. S. 189, 198-199, 79 L. Ed. 850, 857, 55 S. Ct. 386, 390-391; *Pennsylvania v. Williams* (1935), 294 U. S. 176, 182-184, 79 L. Ed. 841, 846-847, 55 S. Ct. 380, 383-385; *State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437, 446-447, 32 Pac. 755, 758-759 (affirmed (1915), 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792); *Mitchell v. Taylor* (1935), 3 Cal. (2d) 217, 219, 43 Pac. (2d) 803.

that a statute requires interpretation does not deprive one who is not required to interpret it of due process of law.

The point that the agreement here approved impaired the obligation of petitioners' contracts falls before the principle, enunciated in this court time and time again, that private contracts must give way to the police power of the state when that power is not capriciously exercised.

No substantial Federal question is raised; and the decision of the trial court is directly in accord, on every Federal point, with many cases heretofore decided by this court.

It is respectfully urged that certiorari be denied.

Respectfully submitted,

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